

1992

Christensen and Fausett v. Swenson and Burns Security Systems : Brief of Appellant

Utah Court of Appeals

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Mark J. Williams; Hanson, Epperson & Smith.

Lynn C. Harris; Harris, Carter & Harrison; Thomas R. Patton; Aldrich, Nelson, Weight & Esplin.

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DOCKET NO. 12011-CA

JEFF CHRISTENSEN, and
KYLE JAMES FAUSETT,

Plaintiffs and Appellants

Appellate No. 920172-CA

Priority No. 16

V.

**GLORIA SWENSON and
BURNS SECURITY SYSTEMS, INC**

Defendants and Appellees.

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY
THE HONORABLE CULLEN Y. CHRISTENSEN

MARK J. WILLIAMS (3494)
HANSON, EPPERSON & SMITH
4 Triad Center, Ste. 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

LYNN C. HARRIS (1382)
HARRIS,CARTER & HARRISON
3325 N. University Ave., Ste. 200
Jamestown Square, Clocktower Bldg
Provo, Utah 84604

THOMAS R. PATTON (2542)
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
Provo, Utah 84601

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IN THE UTAH COURT OF APPEALS

JEFF CHRISTENSEN, and
KYLE JAMES FAUSETT,

Plaintiffs and
Appellants

v.

GLORIA SWENSON and
BURNS SECURITY SYSTEMS, INC

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BRIEF OF APPELLANTS

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MARK J. WILLIAMS (3494)
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43 East 200 North
Provo, Utah 84601

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JURISDICTION OF THE UTAH COURT OF APPEALS

Utah Court of Appeals jurisdiction over this Appeal arises under Utah Code Ann. § 78-2a-3(j) (1987).

STATEMENT OF THE ISSUES

This appeal presents two issues for review:

1. Did the trial court err in determining that Plaintiffs offer no genuine issue as to any material fact?

Standard of Review: The standard of appellate review on summary judgment rulings requires the appellate court to adopt the non-movant's facts. Bishop v. Wood, 426 U.S. 341, 347 (1976). In other words, the court must give the party opposing the motion "the benefit of all inferences which might reasonably be drawn from the evidence." Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1039 (Utah 1991) quoting Payne ex rel. Payne v. Myers, 743 P.2d 186, 187-88 (Utah 1987).

2. Did the trial court err in ruling that reasonable minds could not differ as to the conclusion that Defendant Swenson acted outside the scope of her employment, and thus in granting summary judgment?

Standard of Review: The Utah Supreme Court has stated that when reasonable minds differ as to whether the employee was within the scope of employment, the issue must be submitted to a jury. Clover, 808 P.2d at 1040. Hence, summary judgment should not be granted unless "it is clear from the undisputed facts that the opposing party cannot prevail." Alford v. Utah League of Cities & Towns, 791 P.2d 201, 204 (Utah App. 1990), quoting Lach v. Deseret Bank, 746 P.2d 802, 804 (Utah Ct. App. 1987).

Moreover, as to the trial court conclusions of law regarding the scope of employment, the appellate court accords the trial court's conclusions "no deference, but reviews them for correctness." Clover, 808 P.2d at 1040. See also, Blue Cross & Blue

Shield v. State of Utah, 779 P.2d 634, 636 (Utah 1989); Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989).

DETERMINATIVE STATUTES

Utah Rules of Civil Procedure, Rule 56(c) (1991).

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Jeff Christensen and Kyle James Fausett filed this suit in the Fourth Judicial District Court, Utah County. The cause of action seeks damages from Defendants for injuries caused by negligence. Mr. Christensen and Mr. Fausett claim that Defendant Gloria Swenson negligently failed to stop or yield at a posted stop sign which resulted in a collision between her automobile and the motorcycle they were riding. In the ensuing accident, Mr. Christensen and Mr. Fausett were both seriously injured. Because they allege that the collision occurred while Ms. Swenson acted within the scope of her employment, Mr. Christensen and Mr. Fausett sued Ms. Swenson and her employer, Burns Security Systems, Inc., ("Burns"). Defendant Swenson has since filed for bankruptcy and has been fully discharged.

In response to Mr. Christensen and Mr. Fausett's suit, Defendant Burns filed a Motion for Summary Judgment. The Motion argued that

Ms. Swenson did not act within the course and scope of her employment at the time of the accident and therefore her employer, Burns, could not be held liable. (R. 102) Mr. Christensen and Mr. Fausett opposed the Motion and on November 1, 1991, Judge Cullen Y. Christensen heard oral argument from both sides. (R. 204) On November 5, 1991, Judge Christensen issued an Order granting Defendant Burn's Motion for Summary Judgment. (R. 206) It is from this Order which Mr. Christensen and Mr. Fausett appeal.

STATEMENT OF THE FACTS

The facts in this case concern liability for injuries which Mr. Christensen and Mr. Fausett suffered when Defendant Gloria Swenson struck their motorcycle. At the time the collision occurred, Ms. Swenson worked for Defendant Burns and was on duty as a security guard at the northeast entrance of Geneva Steel. (R. 131)

Because the accident happened when Ms. Swenson rushed across the street to pick up a cup of soup on break, the company's practice concerning breaks become material to this appeal. At all times pertinent to the case, Defendant Burns expected its employees to work as much as possible throughout their entire shift and to take personal comfort breaks, including lunch, with as little interruption to their duties as possible. (R. 144) In fact, no regularly scheduled breaks existed. In addition Burns paid employees during time taken for latrine breaks, coffee breaks, and lunch breaks. (R. 144)

Since Burns employees understood the need to remain on the job as much as possible they either brought their lunch or ordered lunch from one of two nearby cafes. Often one employee would check with others to see if they wanted lunch from the cafes and then pick up lunch for all those that ordered. (R. 142-139). At the northeast station, Gate Four, where Ms. Swenson worked, employees placed a menu near the telephone for the Frontier Cafe, located across the street. (R. 139-138)

Not only did Burns management know about the employee practice of using the cafes for lunch pick ups, but the district manager testified that he too had picked up and distributed lunches for employees. (R. 142) Ms. Swenson testified that her lieutenant told her to check with the other employees to see if they also wanted to order food before she went to pick up her lunch. (R. 139) Frequently she brought food back to her own lieutenants. (R. 139) Furthermore, on occasion the management held company meetings at the cafes. (R. 141; 138).

On July 26, 1989, Ms. Swenson observed a pause in the Geneva Steel traffic and decided to telephone the Frontier Cafe for lunch. According to standard employee practice, she asked her co-worker if he wanted to order some food; he did not. After telephoning her order for a cup of soup, Ms. Swenson began to walk across the street to the cafe and then elected to drive her car because, as her co-worker testified, she believed it would better serve Defendant Burns by returning her to work more quickly. On the way back to work Ms. Swenson failed to yield at a posted stop sign and, as a result entered Mr. Christensen and Mr. Fausett's lane of traffic. Mr. Christensen and Mr. Fausett collided with the Swenson automobile when Mr. Fausett could not stop or avoid the accident. Both Mr. Christensen and Mr. Fausett received serious injuries. (R. 131-128).

SUMMARY OF THE ARGUMENT

In its motion for summary judgment, Defendant Burns failed to meet the standard required by Utah Civil Rule of Procedure, Rule 56(c). Not only did it furnish facts vigorously disputed by Plaintiffs Mr. Christensen and Mr. Fausett, it also neglected to provide enough material facts to support the motion. In contrast, Mr. Christensen and Mr. Fausett furnished numerous facts focused on Defendant Burns' employment policies and practices, central to the issue in this motion. Rather than address most of these facts, Defendant

simply and erroneously dismissed them as irrelevant.

Besides failing to provide the court with undisputed and enough material facts, Defendant Burns also failed to establish that it is entitled to judgment as a matter of law. Under Mr. Christensen and Mr. Fausett's version of the facts, the evidence supports reasonable minds concluding that at the time of the accident Ms. Swenson acted within the scope of her employment.

Factors which fit neatly within the criteria listed in Birkner v. Salt Lake County, 771 P.2d 1953, 1056-57 (Utah 1989) include testimony that Ms. Swenson followed employee practice in using the cafe, in checking with her fellow guard, and in selecting the cafe for its proximity. Burns' management knew about employee use of the cafe for breaks and food, and also used it themselves; Ms. Swenson's conduct was not unexpected. Not only did she remain on duty without logging out or in, as required by company policy, Defendant Burns also paid Ms. Swenson for the time she took on the break. Her short deviation to go across the street and pick up a cup of soup would have taken no more than 5-10 minutes, much like a latrine break. Ms. Swenson's actions were, therefore, incidental to her employment, and not wholly a personal endeavor. Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 492 (Utah 1939) ("A slight deviation from order or attending incidentally to other business than the master's, but which does not dissever the servant from the master's business does not relieve the master from liability for the servant's negligence.")

Second, a jury reasonably could conclude that the cafe is substantially within the ordinary spatial boundaries of Ms. Swenson's employment because of its close proximity to her station. Testimony depicted the cafe as no farther than the closest latrine facility on Geneva property. Furthermore, Burns use of the Frontier Cafe for meetings, breaks, and as a place to order and take out food serves to bring it substantially within the spatial boundaries of

employment.

Finally, the manner in which Ms. Swenson took her break, waiting for a lull in traffic, using a car so that she might return to work more quickly, and resorting to the closest possible facility, all indicate that the context of her conduct focused primarily on serving her employer's interest. Like the facts in Clover v. Snowbird Ski Resort, 808 P. 2d 1037 (Utah 1991), the evidence in this case is sufficient for a jury to conclude that at the time of the accident, Ms. Swenson acted within the scope of her employment.

ARGUMENT

POINT 1: GENUINE ISSUES OF MATERIAL FACT PRECLUDE THE COURT FROM GRANTING SUMMARY JUDGMENT.

On November 5, 1991, the trial court granted Defendant Burns' Motion for Summary Judgment stating: "In the view of the Court there is no genuine issue as to any material fact and that said Def is entitled to Judgment as a matter of law." See Exhibit 1, Ruling, Nov. 5, 1991 at 1(a). Hence, the first concern in this appeal is whether genuine issues of material fact do exist which would prevent a summary judgment ruling. Plaintiffs, Mr. Christensen and Mr. Fausett, assert that they have adequately demonstrated the material facts to be in dispute and that on this basis, the trial court's ruling should be overturned.

The language of the court's order granting summary judgment clearly reflects the standard provided in Rule 56, Summary Judgments. This Rule states in part (c):

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Utah R. Civ. P. 56(c) (emphasis added). In other words, according to the highlighted portion quoted above, the Defendant must first establish that 1) no dispute exists, 2) concerning facts that are material to the cause of action.

In attempting to carry this burden, Defendant provided the court with a list of six allegedly undisputed facts. Defendant's Memorandum in Support at 1-3. All of these statements, with the exception of Fact #4, Mr. Christensen and Mr. Fausett dispute as misleading or incomplete. In other words, Defendant has not only failed to furnish enough material facts, it has also failed to establish that those provided are undisputed.

Thus for example, in its Fact #6 Defendant asserted that "the guards could take a short break in the area of their appointed post. Lunch was expected to be taken on the job." By way of response, Mr. Christensen and Mr. Fausett offered depositions from both management and employees establishing that the guards were not so limited. Kim Hancey, Burns' Client Supervisor, stated that because the restroom facilities for the gate were in the next office building, the guards did not have to take their breaks at the specific island or at the gate post.¹ Furthermore Kenneth H. Mayne, the highest member of management for Burns in the region, testified that Burns had no written procedures nor oral policies concerning either latrine or lunch breaks.² Oreon G. Olsen, a fellow guard with Ms. Swenson,

1 See Exhibit 2, Hancey Deposition at page 33, lines 10-18

2 See Exhibit 3, Mayne Deposition at page 38, line 17 through page 39, line 24.

noted that he had never been told that he could not go to the Frontier Cafe and get lunch.³ And, Ms. Swenson emphasized that “we had no policy that you could not leave or anything else. And we just went across the highway to get our lunches a lot of the time.”⁴ Moreover, as Ms. Swenson pointed out, not only did the management know that the guards left their posts for breaks and lunch, the lieutenants also used the cafes to get their own lunch and to pick up lunches for others.⁵

In statement #5, Defendant declared that the Frontier Cafe is located outside Geneva Steel boundaries where Ms. Swenson worked. While Mr. Christensen and Mr. Fausett acknowledge that the Cafe does not lie within the geographical boundaries of the Geneva Plant, nonetheless they provided ample evidence of its use and role in Burns’ activity. Mr. Mayne, Burns’ District Manager, admitted that the management occasionally held meetings at cafes outside Geneva and that he personally had picked up lunches from Frontier.⁶ Captain Mike Transtrum, supervisor of all security officers, reported that these meetings occurred “once or twice a month.”⁷ In addition, Mr. Transtrum observed that Burns’ guards used the cafes for various breaks including latrine and lunch breaks.⁸ Specifically, guards stationed at Ms. Swenson’s post either walked or drove across the street to the Frontier Cafe to pick up food.⁹ Mr. Olsen, a fellow

3 See Exhibit 4, Olsen Deposition at page 29, lines 8-13.

4 See Exhibit 5, Swenson Deposition at page 18, lines 2-4.

5 See Exhibit 5, Swenson Deposition at page 43, lines 9-16, and page 56, lines 12-18.

6 See Exhibit 3, Mayne Deposition at page 43, lines 20-25, and at page 41, lines 5-18.

7 See Exhibit 6, Transtrum Deposition at page 36, lines 5-19.

8 See Exhibit 6, Transtrum Deposition at page 43, lines 11-21; page 16, line 6 through page 17, line 10; and page 28, lines 10-22.

9 See Exhibit 7, Bezzant Deposition at page 12, lines 16-19 and page 16, lines 17-22.

guard stationed with Ms. Swenson, stated that although he had not used the Frontier Cafe during a working shift, he knew that other guards did.¹⁰

As with Fact #5, Mr. Christensen and Mr. Fausett assert that while the remainder of Defendant's facts may provide some information, by and large the information is inaccurate because it fails to give the context and the events surrounding Defendant Burns employment policies and procedures. Accordingly, Defendant's statement of facts fails to establish its case and bars it from obtaining a motion for summary judgment. See Plaintiffs Memorandum in Opposition at 8-26, wherein Mr. Christensen and Mr. Fausett furnish the trial court with a statement of 40 additional facts, many of which contradict the version Defendant provides.

Rather than admit or dispute Mr. Christensen and Mr. Fausett's list of facts, Defendant primarily dismisses them as irrelevant. Reply Memorandum at 5-8. This argument leads to the second part of Defendant's burden, that no dispute exists over material facts. In other words, Defendant seems to argue that the facts upon which Mr. Christensen and Mr. Fausett rely to dispute those provided in its motion, are immaterial. Hence, in its reply to Plaintiffs Memorandum, Defendant Burns contended that the court must limit its examination to what happened on the day of the accident. Reply Memorandum at 2. Specifically, Defendant insisted that the court could not consider the employees' lunchtime practices and their use of the Frontier cafe. Nor could the court review Defendant Swenson's prior acts and the instructions she received from management concerning lunch breaks. Id.

Since the critical issue in this case is whether or not Defendant Swenson injured Mr. Christensen and Mr. Fausett while in the scope of her employment, thereby creating liability in Defendant

¹⁰ See Exhibit 4, Olsen Deposition at page 26, line 16 through page 28, line 21.

Burns, Plaintiffs assert that the court must consider employment policies and practices. These facts not only provide an important framework, but they also literally define the duties and sweep of employment and thus are material.

Black's Law Dictionary states that in the context of summary judgment:

A fact is "material" and precludes grant of summary judgment if proof of that fact would have effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law to the rights and obligation of the parties.

Black's Law Dictionary 977 (6th ed. 1990) citing Johnson v. Soulis, 542 P.2d 867, 872 (Wyo. 1975). In this case, Defendant Burns claims as its defense that Ms. Swenson acted outside the scope of her employment. Therefore, according to the dictionary definition, any fact that would refute Defendant's claim and would instead establish that Ms. Swenson was within the scope of employment when she injured Mr. Christensen and Mr. Fausett would necessarily be material.

Although Utah law has not yet directly addressed what facts in a scope of employment case are material, the Utah Supreme Court provides some indication in Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991). Like this case, Clover concerned a summary judgment ruling holding that an employee had not acted within his scope of employment when injuring a guest in a skiing accident. The Utah Supreme Court reversed the grant of summary judgment, citing the following facts. Snowbird Ski Resort hired the Chris Zulliger as a chef in its restaurant at the base of the mountain. In addition, Mr. Zulliger sometimes checked on the restaurant midway up the mountain. Prior to the accident he had made several inspection trips

to the latter restaurant, with Snowbird occasionally paying for these additional trips. Clover, 808 P.2d at 1038.

On the day of the accident, Mr. Zulliger decided to go skiing before work. The restaurants' manager asked him to check the location part way up the mountain. Although he had not begun work, Mr. Zulliger obliged and stopped at the restaurant in the middle of his first run down the slope. After leaving the restaurant, he skied an additional four runs. On his final run, and on the way to work at the lower restaurant, Mr. Zulliger skied off a crest and collided with the plaintiff. The Court also noted that the Snowbird Ski patrol had warned people not to ski off of the crest and that a posted sign instructed skiers to ski slowly in that area. Mr. Zulliger had ignored the sign and skied over the crest at a high rate of speed. Id. at 1039.

The plaintiff sued Mr. Zulliger and, on a theory of respondeat superior, the ski resort. Upon the ski resort's motion for summary judgment the trial court, as in this case, ruled that no genuine issues of material fact existed and that as a matter of law Mr. Zulliger was not acting within the scope of his employment at the time of the accident. Id. at 1039.

In providing the above facts, the Utah Supreme Court must have believed them to be material to its decision. If, however, the Court had adopted Defendant's argument in this case -- that a court is limited to the events which occurred on the day of the accident -- the facts certainly would have read differently. Indeed, under Defendant's approach the statement would more likely match the one provided in this case and simply read:

1. Snowbird hired Mr. Zulliger as a chef in its restaurant at the base of the mountain.
2. On the day of the accident, Mr. Zulliger checked the restaurant midway up the mountain and then left to ski.
3. That day Mr. Zulliger did not perform any other duty for Snowbird prior to the accident.

4. He skied four runs and on the last one, as he was returning to work, Mr. Zulliger was involved in an accident.

5. The ski runs do not occupy a part of either restaurant where Mr. Zulliger worked.

6. The resort had a sign posted to ski slowly in the area where the accident occurred.

Nothing in this truncated statement provides the background and context which would aid a court in determining the extent an employee may leave his or her assigned work and still be within the scope of his or her employment.

In this case the very facts which Defendant Burns passes off as “irrelevant” serve to inform the court what employee practices and procedures circumscribe the scope of employment. Defendant fails both to address Plaintiffs’ statement of facts and to provide enough material facts to support its motion. Moreover, Mr. Christensen and Mr. Fausett adequately dispute Defendant’s statement of facts as inaccurate or incomplete. Therefore, the trial court’s grant of Summary Judgment must be overturned. B & A Assoc. v. L.A. Young Sons Construction, 796 P.2d 692, 694 (Utah 1990) (“Where there is a material issue of fact, however, summary judgment is inappropriate.”); Atlas Corp v. Clovis Nat’l Bank, 737 P.2d 225, 229 (Utah 1987) (“If ... we conclude that there is a dispute as to a genuine issue of material fact, we must reverse the grant of summary judgment and remand for trial on that issue.”).

POINT 2: BECAUSE REASONABLE MINDS COULD DIFFER AS TO WHETHER DEFENDANT SWENSON ACTED WITHIN THE SCOPE OR HER EMPLOYMENT, THIS ISSUE MUST BE SUBMITTED TO A JURY

The second part of Rule 56, Summary Judgment, requires the movant, after establishing that no dispute exists as to material facts, to prove that “the moving party is entitled to a judgment as a

matter of law.” Utah R. Civ. P. 56(c). Again, Defendant fails to meet the standard set out in the rule.

To find that Defendant is entitled to win as a matter of law, the Court must first measure the applicable law using Mr. Christensen and Mr. Fausett’s statement of the facts. See Bishop v. Wood, 426 U.S. 341, 347 (1976) (“Since the District Court granted summary judgment against the petitioner, the Court must accept his version of the facts.”); United States v. Diebold, 369 U.S. 654, 655 (1962) (“In our appraisal of petitioner’s claim we must accept his version of the facts since the District Court granted summary judgment against him.”); Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1039 (Utah 1991)(“[W]hen reviewing an order granting summary judgment, the facts are to be liberally construed ‘in favor of the parties opposing the motion, and those parties are to be given the benefit of all inferences which might reasonably be drawn from the evidence.’”) quoting Payne ex rel Payne v. Myers, 743 P.2d 186, 187-88 (Utah 1987).

Second, after applying Mr. Christensen and Mr. Fausett’s version of the facts to the law, the Court must deny, or overrule the grant of summary judgment unless there is “no reasonable probability that the party moved against could prevail.” Frisbee v. K & K Construction Co., 676 P.2d 387, 389 (Utah 1984). See also, Alford v. Utah League of Cities & Towns , 791 P.2d 201, 204 (Utah App. 1990)(Summary judgment should not be granted, unless “it is clear from the undisputed facts that the opposing party cannot prevail.”) quoting Lach v. Deseret Bank, 746 P.2d 802, 804 (Utah Ct. App. 1987).

This strict caveat particularly applies in a case such as this where, as Defendant admits, the “question of whether an employee is acting within the scope of employment is a question of fact.” Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991); Defendant’s Memorandum in Support at 3. Hence, the law in this case

requires that the issue “must be submitted to a jury ‘whenever reasonable minds may differ as to whether the [employee] was at a certain time involved wholly or partly in the performance of his [employer’s] business or within the scope of employment.’” Clover, 808 P.2d at 1040, quoting Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 493 (1939).

Against the backdrop of Plaintiffs’ facts and the exacting legal standard cited in the preceding paragraphs, Defendant fails to meet any of the three criteria which would entitle it to judgment as a matter of law. These three criteria, described in Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989), and refined in Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991), demonstrate, as a matter of law, that reasonable minds could find that Gloria Swenson acted within the scope of her employment when she injured Mr. Christensen and Mr. Fausett.

A. Gloria Swenson’s Conduct Was Reasonably Incidental to Her Employment Duties and Therefore Was Not Wholly a Personal Endeavor.

In determining whether an employee acts within his or her scope of employment, the court examines the nature of the conduct. The Utah Supreme Court, in Birkner v. Salt Lake County, puts it this way:

[A]n employee’s conduct must be of the general kind the employee is employed to perform That means that an employee’s acts or conduct must be generally directed toward the accomplishment of objectives within the scope of the employee’s duties and authority, or reasonably incidental thereto. In other words the employee must be about the employer’s business and the duties assigned by the employer as opposed to being wholly involved in a personal endeavor.

771 P.2d 1053, 1056-57 (Utah 1989)(emphasis added). The Court's formulation does not mean that a decision as to whether an employee acts within his or her scope of employment can be simply and readily determined. In discussing acts of a personal nature, the Comment to the Restatement on Agency observes:

Although the servant is authorized to act, the master is not liable for his conduct unless the servant is in fact acting in the employment and for his master's purposes. Getting ready to work or clearing away after work may be within the scope of employment. So, even such personal matters as eating and cleaning of the person may be so much a part of the work and under such control that is part of the employment. This is true if the master assumes control over the general conduct of the servant during such period. If, however, such acts are for the personal convenience of the employees and are merely permitted by the master in order to make the employment more desirable, the acts are not within the scope of employment.

Restatement (Second) of Agency § 229, Comment (c) (1958)(emphasis added).

Moreover, personal behavior "incidental to the conduct authorized" could create liability in the employer. *Id.* at § 229(1). And, other factors may bring the action within the scope of employment. Some of these factors, listed in the Restatement of Agency and quoted in Birkner, include questions such as the following: Is the act similar to what is authorized; is it one commonly done by other employees of the same type; and does the employer have reason to expect that the conduct will take place. Birkner 771 P.2d at 1056; Restatement (Second) of Agency § 229(2) (1958).

In Birkner, the Court applied these various questions and factors to hold that the employee acted outside his scope of employment. There, the employee worked for Salt Lake County as a

therapist at the county mental health facility. After the employee became sexually involved with a patient, the patient sued both the employee and the county. The Utah Supreme Court affirmed the trial court's grant of summary judgment in favor of the county; respondeat superior did not apply.

In arriving at this conclusion, the Court noted that although the offending conduct took place during, or in connection with, therapy sessions, "it was not the general kind of activity a therapist is hired to perform." 771 P.2d 1058. Nor could it be said that the sexual activity was incidental to authorized activity. The employee's acts were not similar to what therapists are authorized to perform; they are not commonly done by other therapists; and the employer generally does not expect that the conduct will take place. In fact, written policy forbids sexual contact between social workers and patients. Id.

In contrast, the Court in Clover v. Snowbird Ski Resort held that the employee's acts did fall within in the scope of employment. As discussed in Section I, Mr. Zulliger duties consisted of work as a chef in one restaurant, and occasionally monitoring the work in another restaurant. On the day of the accident, before beginning work and yet after checking the second restaurant, Mr. Zulliger skied several runs. On his last time down the slope, he collided with and injured the plaintiff. 808 P.2d 1037, 1038-39 (Utah 1991).

The Court ruled that reasonable minds might differ as to whether Mr. Zulliger acted within his employment. It stated that because Snowbird expected its employees to know how to ski and to use the ski lifts and runs, Mr. Zulliger's actions "could be considered 'to be of the general kind that the employee is employed to perform.'" Id. at 1041, quoting Birkner, 771 P.2d at 1057. Even though Mr. Zulliger did not return immediately to his job after inspecting the restaurant, the Court decided that the factual elements present required a jury determination of whether he acted

within the scope of his employment when he injured the plaintiff.

Likewise, in this case, Ms. Swenson performed duties of the general kind that Burns hired its employees to perform. Just as Mr. Zulliger worked as a chef, Ms. Swenson worked as a security guard at Gate Four. Mr. Zulliger was instructed to sometimes check on the second restaurant. Similarly, according to practice among the security guards at Gate Four and the Island Gate, Ms. Swenson checked with other employees to see if they wanted food from the Frontier restaurant when she ordered food there for herself.¹¹ Both Mr. Zulliger and Ms. Swenson conducted this activity while on breaks or, in the case of Mr. Zulliger, on his own time. And, both employees were paid for the time they spent.¹² And, although it might be argued that Burns did not hire Ms. Swenson specifically to pick up and deliver food,¹³ neither did Snowbird hire Mr. Zulliger to ski.

On the day of the accident, the Court found it important that Mr. Zulliger had been following instructions to inspect the second restaurant; the accident occurred after he had done his job and was returning to work. Similarly, on the day that Ms. Swenson collided with Mr. Christensen and Mr. Fausett, she specifically asked fellow security guard, Oreon Olsen if he would like her to bring back food for him.¹⁴ It was on her way back to her station that the accident happened. Significantly, after Mr. Zulliger finished his assignment to check the restaurant he took time to make at least four ski runs

11 See Exhibit 5, Swenson Deposition at page 55, lines 1-5. Later, after the accident Ms. Swenson's supervisor specifically instructed her to check on the security guards. Swenson Deposition at page 57, line 11 through page 58, line 16.

12 Concerning paid break time for Burns' employees, see Exhibit 6, Transtrum Deposition at page 69, lines 8-22; Exhibit 5, Swenson Deposition at page 53, lines 1-19.

13 See Love v. Liberty Mutual Insurance Co., 760 P.2d 1085 (Ariz. App. 1988) (waitress who, immediately following her shift, drove to assistant manager's house at request of band member to pick up microphone part was acting within the scope of her employment.);

14 See Exhibit 5, Swenson Deposition at page 17, lines 14-25; page 74, lines 3-6.

before deciding to report in for work. By contrast, Ms. Swenson phoned in the order for food, immediately left to pick it up and, without any other deviation returned to work. The entire trip would have taken 5-10 minutes,¹⁵ no more than a latrine break. See Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 492 (Utah 1939) ("A slight deviation from order or attending incidentally to other business than the master's, but which does not dis sever the servant from the master's business does not relieve the master from liability for the servant's negligence.")

Ms. Swenson's actions in ordering food for fellow guards, in going across the street to the Frontier Cafe to pick up lunch, and in returning with the lunches mirrored the actions of other Burns' employees, including management employees.¹⁶ Clearly, because she followed employee practice in performing these activities, her conduct was not unexpected. Moreover, she acted somewhat under Burns' control, limiting her break to the shortest time possible¹⁷ and hence even the personal act of eating could be said to be either within the scope of her employment or reasonably incident to its purposes. Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 492 (Utah 1939) ("One does not cease to be acting within the course of the master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual or incidental personal acts ...").¹⁸

15 See Exhibit 4, Olsen Deposition at page 35, lines 20-24; Exhibit 2, Hancey Deposition at page 30, line 11 through page 33, line 11.

16 See Exhibit 3, Mayne Deposition at page 41, lines 5-18; Exhibit 5, Swenson Deposition at page 56, lines 11-23 and page 43 at lines 9-16; Exhibit 4, Olsen Deposition at page 26, lines 16 through page 27, line 11 and page 33, lines 4-9.

17 See Exhibit 4, Olsen Deposition at page 30 at lines 14-16.

18 Although not directly applicable to this case, an analogy may be found in Workers' Compensation cases. See e.g., King Waterproofing Co. v. Slovsky, 71 Md. App. 247, 524 A.2d 1245 (N.J. 1987) (Employee within scope of employment while on paid break, crossed the street to enter restaurant which was customarily used by employer and employees); Cooper v.

B. Gloria Swenson's Actions Occurred Substantially within the Hours and Ordinary Spatial Boundaries of Her Employment.

Besides the nature of the employee's conduct, the court also looks to the locale and time of the employee's actions. In Birkner v. Salt Lake County, the Utah Supreme Court held that in order for an employee's conduct to be considered within the scope of employment, he or she must be inside the hours and ordinary spatial boundaries of the employment. 771 P.2d 1053, 1057 (Utah 1989). The Court modified this criterion in Clover v. Snowbird Ski Resort, by adding that the employee need only be *substantially*¹⁹ within the hours and ordinary spatial boundaries. 808 P.2d 1037, 1040 (Utah 1991).

Without question, the accident injuring Mr. Christensen and Mr. Swenson occurred wholly within Ms. Swenson's working hours. Burns' management repeatedly describes workers as logging into work upon arrival and logging out when going off duty at the end of

Stephens, 470 So. 2d 852 (Fla. App.), petition for rev denied, 480 So. 2d 1296 (Fla. 1985) (Employee within scope of employment when killed a few feet from the plant as he was leaving to get coffee at a nearby cafe. Employee was on time clock and he had never been instructed not to leave on breaks.); Toohey v. Workmen's Comp. App. Bd., 32 Cal. App. 3d 98, 107 Cal. Rptr 773 (1973) (Employee within the scope of employment when using seven minute break to leave employer's premises and retrieve his lunch from car parked directly across the street.); Jordan v. Western Elec. Co., 1 Or. App. 441, 463 P.2d 598 (1969) (Employee within scope of employment when returning from coffee break. Although employer provided canteen facilities on premises, employees customarily went to the nearest restaurant, often accompanied by supervisor, and were paid for break).

19 Plaintiffs Mr. Christensen and Mr. Fausett respectfully submit that the trial court erred by using the wrong standard to determine whether or not Ms. Swenson acted within the scope of her employment. In issuing its order, the trial court ruled that Ms. Swenson's conduct "was not as a matter of law *within the ordinary spatial boundaries* of her employment" See Exhibit 1 Ruling, 1(c), November 5, 1991 (emphasis added). Clearly, by omitting the word "substantially," the court reads the test too narrowly. Moreover, eliminating "substantially" from the standard carefully set out by the Court in Clover v. Snowbird Ski Resort, simply submits Mr. Christensen and Mr. Fausett to the wrong analysis.

the shift.²⁰ No one logs in and out for lunch or other breaks.²¹ Moreover, while its employees take their breaks, Burns continues to pay them during that time.²²

The issue under this test then, focuses on whether the accident occurred substantially within the ordinary spatial boundaries of Ms. Swenson's employment. The Utah Supreme Court in Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991), illustrates how an employee may not be technically within the boundaries or hours of employment and yet still fall within the parameters of this criterion.

The facts of Clover, discussed above, describe the employee, Mr. Zulliger, as arriving at work early because he intended to ski four or five runs before beginning his shift in the lower restaurant. The manager of both of Snowbird's restaurants asked Mr. Zulliger to check on the one midway up the mountain. Accordingly, on his first time down the slope he stopped and spent approximately twenty minutes inspecting the kitchen, talking to personnel, and having a snack. Mr. Zulliger then continued skiing on his own time. During his last run on an intermediate slope he collided with and injured the plaintiff. 808 P.2d 1038-39.

In this situation, the Court concludes that "there would be evidence that Zulliger's actions occurred within the hours and normal spatial boundaries of his work." Id. at 1041. Clearly, Mr. Zulliger had not begun his work at the restaurant nor was he exactly within the spatial boundaries of his employment -- the restaurant. The

²⁰ See Exhibit 3, Mayne Deposition at page 35, line 20 through page 36, line 16; Exhibit 2, Hancey Deposition at page 9, line 9 through page 20, line 22; Exhibit 6, Transtrum Deposition at page 64, line 11 through page 65, line 7.

²¹ See Exhibit 3, Mayne Deposition at page 36, line 17 through page 38, line 12; Exhibit 6, Transtrum's Deposition at page 69, lines 8-22.

²² See Exhibit 6, Transtrum's Deposition at page 69, lines 8-22; Exhibit 5, Swenson's Deposition at page 53, lines 1-19.

Court shuns these technical arguments, and points out that Mr. Zulliger was *substantially* within the test. That is, he was on property owned by his employer and at times he had been asked to monitor the other restaurant when not working. *Id.* at 1042-43. The Court does not seem too concerned with the obvious, more particular argument: that Mr. Zulliger had completed the assigned task and was skiing on his own time, in a location apart from either restaurant. Apparently, as Clover illustrates, in determining whether the employee's conduct occurred substantially within the hours and ordinary spatial boundaries, the court looks to the general aspects rather than the precise details.

Like the context in Clover, reasonable minds could decide that Ms. Swenson's accident occurred substantially within the spatial boundaries of her employment. Her journey to the Frontier Cafe involved merely crossing the street. In fact, the restroom facilities at the cafe are about the same distance away from Island Gate Four as the restroom facilities farther into Geneva at the Lower Gate Four.²³ Consequently some guards considered the cafe more convenient for breaks; that is, it allowed a guard to be close in proximity to Gate Four, leave that post for the shortest possible time, and be back at the gate as soon as possible.²⁴

Both Burns employees and management repeatedly used the cafe for breaks, meetings, and as a place to pick up food and then distribute it to fellow workers.²⁵ Prior to the accident, not only

²³ See Exhibit 7, Bezzant Deposition at page 10, lines 1-11

²⁴ See Exhibit 7, Bezzant Deposition at page 24, line 7-12.

²⁵ See e.g., concerning breaks: Exhibit 6, Transtrum's Deposition at page 43, lines 11-21.

Concerning meetings: Exhibit 2, Hancey Deposition at page 40, lines 12-20; Exhibit 6, Transtrum Deposition at page 36, lines 5-19.

Concerning lunches: Exhibit 6, Transtrum Deposition at page 16, line 6 through page 17, line 10 and page 28, lines 10-22; Exhibit 7, Bezzant Deposition at page 12, lines 16-19 and page 16, lines 17-22; Exhibit 4, Olsen Deposition at page 26, line 16 through page 27, line 11; page 28 lines 5-21; page 33, lines 4-9; Exhibit 5, Swenson Deposition at page 51, line 20 through page 52, line 17; page 56, lines 19-23; page 57, line 11 through page 58, line 5.

did Burns know about the employee use of the cafe during working hours, they also had never objected such use.²⁶ As Defendant Swenson testified when asked if the management knew about employee use of Frontier Cafe: "I am sure they did. The Lieutenants themselves went there."²⁷

In Clover, the Utah Supreme Court held that Mr. Zulliger's participation in skiing prior to work could be considered substantially within his hours of employment and that his skiing outside the location of his job put him substantially within spatial boundaries of his employment. Clover, 808 P.2d at 1041 and 1042-43. In much the same way, evidence exists to support the conclusion that the Frontier Cafe could be considered substantially within the spatial boundaries Ms. Swenson's employment.

C. Gloria Swenson's Rapid Trip to the Frontier Cafe to Obtain Lunch was Partly Motivated by an Interest to Serve Her Employer, Defendant Burns.

Finally, to be within the scope of employment, "the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest." Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989). Therefore, in determining the employee's motivation for his or her conduct, the court looks carefully to the factual circumstances and the employee's state of mind. Restatement (Second) of Agency § 235, Comment (a) (1958).

In this case, Ms. Swenson's trip to the Frontier Cafe consisted of little more than a short break from work. Although she picked up

²⁶ See Exhibit 6, Transtrum Deposition at page 44, lines 3-23; Exhibit 3, Mayne Deposition at page 60, line 13 through page 61, line 16.

²⁷ See Exhibit 5, Swenson Deposition at page 43, lines 9-16. See also Exhibit 7, Bezzant Deposition at page 18, lines 14-23.

a cup of soup, she did not eat it on the premises nor did she stay longer than enough time to pay for the item. In this sense, her deviation from work cannot be considered in the same category as a lunch break, rather it resembles more a latrine break in time and in distance. See W. Keeton, Prosser and Keeton on the Law of Tort §70, at 503-04 (5th ed. 1984) ("Certain activities for the personal benefit of the employee, such as going to the toilet ... are quite generally recognized as so necessary, usual, closely tied in with the work, that they are held not to constitute deviations from the employment.").

Moreover, Ms. Swenson's actions indicate a state of mind focused primarily on her employer's benefit. For example, she did not take her break at her convenience. Rather, as Ms. Swenson testified, she was concerned about discharging her duties:

Okay. It was busy, usually is at that station. Trucks are coming real heavy. They are backed up clear to the highway. About quarter after 11:00 -- you almost -- like there is 20 minutes you will get a break. I guess the truckers go to lunch is all we can figure.

...

Well, it would come at different times, but at about a quarter after I asked, Oly, I says, Are your ready for lunch. And he says, No, I don't think I have or want one today. And I says, Okay, it looks like there is a break out there. I think I will go get me a cup of soup.

Exhibit 5, Swenson Deposition at page 17, lines 14-25. In addition Mr. Olsen, the guard stationed with Ms. Swenson the day of the accident, recalled that Ms. Swenson intended to walk to the cafe and then changed her mind, stating, "I'll take the car so I can get back quicker" Exhibit 4, Olsen Deposition at page 30, lines 15-16. Although Ms. Swenson decided to take a break and pick up a cup of soup, her concern about timing and method of travel, as well as her use of the nearest facility, indicate that her conduct was primarily

motivated by an interest to serve her employer.²⁸

In further analyzing whether the employee's conduct seeks to serve the employer's interest, the Court in Clover v. Snowbird Ski Resort explained that several variations of the Birkner test have been used. The Court also noted that these other approaches do not substitute for the basic Birkner analysis, rather they provide assistance in particular factual settings. 808 P.2d at 1040-41.

Although the Court discussed the first approach, the "dual purpose doctrine," it concluded that the facts in Clover are better analyzed under the second approach, the personal detour cases. Id. at 1041-42. This analysis involves circumstances where the employee carries out duties assigned by the employer and in the process deviates from the duties for a personal reason. The issue in such cases focuses on whether the employee abandons his or her employment in meeting the personal objectives, and thereby acts outside the scope of employment. When a question exists as to whether the employee's conduct constituted an abandonment or only a slight deviation, the court must leave the issue for the jury. Id. at 1042.

In applying the personal detour approach, the Clover Court listed several factors which led it to conclude that Mr. Zulliger, the employee, had not abandoned his employment sufficiently to exempt the jury from deciding the issue. First the Court noted that a jury could reasonably believe that since Mr. Zulliger was skiing his last run, he had resumed his return to work. Id. The Court emphasized this factor stating, "if the employee has resumed the duties of

²⁸ Cf., 1A Larson, The Law of Workmen's Compensation, § 15.52. Professor Larson notes that in Workers' Compensation cases an employee falls within the scope of employment when: the lunch ... is undertaken under special circumstances to suit the employer's convenience, as ..., where the employee was told to rush out, get a quick bite to eat, and hurry back because of the pressure of work. ... Here the very making of a lightning excursion for lunch is an effort expended in the employer's interest to conserve his time.

Id.

employment, the employee is then ‘about the employer’s business’ and the employee’s actions will “motivated, at least in part, by the purpose of serving the employer’s interest.” Id. quoting Burton v. La Duke, 61 Utah 78, 210 P. 978, 979-81 (1922).

The second factor stressed by the Court directly addressed Mr. Zulliger’s decision to continue skiing after carrying out instructions to inspect the second restaurant. The Court noted that in cases holding that the employee had abandoned his employment, the court focuses on whether the actions are “in direct conflict with the employer’s directions and policy.” 808 P.2d at 1042, citing Cannon v. Goodyear Tire & Rubber Co., 60 Utah 346, 208 P. 519 (1922). In choosing to ski, Mr. Zulliger’s actions did not directly conflict with Snowbird’s instructions. As the Court pointed out, Snowbird issued its employees season ski passes as part of their compensation.

In this case, Ms. Swenson’s conduct analyzed under the personal detour approach²⁹ also demonstrates that reasonable minds could believe that she had not abandoned her employment for a personal errand. As with Mr. Zulliger, Ms. Swenson was returning to her post at the time of the collision. Significantly, the Clover Court dismissed the fact that the accident occurred above the restaurant where Mr. Zulliger’s employer had sent him. The Court noted that in cases, like this one, where the accident occurs substantially within the normal spatial boundaries of employment, “employees may be

²⁹ Defendant may attempt to claim that the facts in this case warrant analysis under the first approach--the dual purpose doctrine. Even under this method, however, Ms. Swenson’s conduct falls within the scope of employment. In the dual purpose doctrine, the court focuses on whether the employee’s actions are primarily personal or business oriented. As already discussed in the second and third paragraphs of Subsection C, Ms. Swenson acted primarily out of concern for her employer. Her momentary break to pick up a cup of soup was taken at its convenience and in a manner most likely to return Ms. Swenson quickly to her work.

Moreover, the supplementary part of the dual purpose doctrine, the “second trip test” does not apply in this case. The Clover court notes that the test is used in situations where the employee makes a trip away from work. 808 P.2d at 1041. Here Ms. Swenson’s break from her post cannot be considered a trip anymore than a latrine break, or a coffee break might be considered a trip.

within the scope of employment if, after a personal detour, they return to their duties and an accident occurs.” 808 P.2d at 1042.

Likewise, under the second factor, a jury could reasonably believe that Ms. Swenson had not abandoned her employment. As Clover explained, a substantial departure from employment will involve actions taken in direct conflict with the employer’s directions and policy. Id. At the time of the accident in this case, Burns issued no policy, oral or written on breaks or the use of the Frontier Cafe.³⁰ Nor had it given any instructions not to use the cafe.³¹ In fact, both management as well as employees resorted to the cafe for lunch and restroom breaks, and for meetings.³²

CONCLUSION

A motion for summary judgment requires that no disputed issues of material facts exist so that the court can rule for the moving party as a matter of law. When appropriately used, the motion can save the time, effort and expense of a trial. The Utah Supreme Court has warned, however, that in cases where disputed issues need to be resolved, “the granting of such a motion fails of that objective, and the hoped for advantages are not only lost, but there actually results a greater expenditure of time and effort ...” Western Pacific Transport Co. v. Beehive State Agricultural Co-Op, 597 P.2d 854, 855 (Utah 1979). Based upon Defendant Burns incomplete and disputed statement of facts, this is such a case.

Not only does Defendant Burns fail to meet Rule 56(c)’s factual requirements, it also fails to establish that as a matter of law, it is entitled to judgment. For these reasons and all of those discussed

30 See Exhibit 3, Mayne Deposition at page 38, line 17 through page 39, line 24; page 70, line 25 through page 71, line 7.

31 See Exhibit 3, Mayne Deposition at page 44, line 24 through page 45, line 5.

32 See n. 25.


above and in the official court record, Plaintiff Jeff Christensen and Kyle James Fausett respectfully request that the Court grant this appeal and set aside the trial court's order of summary judgment.

DATED this 12th day of May, 1992.



LYNN C. HARRIS
Attorney of Record for
Plaintiff Christensen

DATED this 12th day of May, 1992.



THOMAS R. PATTON
Attorney of Record for
Plaintiff Fausett

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 12th day of May, 1992, by first-class, U.S. Mail, postage prepaid to the following:

Mark Williams
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Salt Lake City, UT 84180

Stanley R. Smith
P.O. Box 310
American Fork, UT 84003

Tom Patton
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
Provo, UT 84601

UPH

EXHIBIT 1

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

JEFF CHRISTENSEN et al

Plaintiffs,

CASE NUMBER: CV 89 278

vs.

RULING

GLORIA SWENSON et al

Defendants.

This matter comes before the Court, under Rule 4-501, on the motion of Def Burns International Security Services seeking Summary Judgment. The Court has reviewed the file, considered the memoranda of counsel, entertained argument of counsel, and upon being advised in the premises, now makes the following:

RULING

1. Said motion is granted for the following reasons:
 - (a) In the view of the Court there is no genuine issue as to any material fact and that said Def is entitled to Judgment as a matter of law.
 - (b) That in going to the Frontier Cafe to buy lunch, Gloria Swenson's conduct was not as a matter of law of the general kind for which she was employed to perform by Def Burns.
 - (c) That the conduct of Swenson in going to the Frontier Cafe was not as a matter of law within the ordinary spatial boundaries of her employment with Burns.

- (d) That the conduct of Swenson in going to the Frontier Cafe was not as a matter of law motivated in whole or in part by the purpose of serving Burns' interest as the employer of Swenson.
- (e) That in the opinion of the Court the activity of Swenson in leaving her post at Gate 4 to go to the Frontier Cafe to purchase lunch was so clearly without the scope of her employment with Burns that reasonable minds could not differ as to such conclusion.

Dated this 5 day of November, 1991.

BY THE COURT:


CULLEN A. CHRISTENSEN, JUDGE

cc: Thomas Patton, Esq.
Lynn Harris, Esq.
Mark Williams, Esq.
Stanley R. Smith, Esq.

EXHIBIT 2

EXCERPTS OF KIM S. HANCEY DEPOSITION

1 they doing everything besides that.

2 Q (By Mr. Harris) No. I just want to know, in
3 your mind this 10 to 15 minutes -- I'm just trying to
4 decide what goes on in those 10 to 15 minutes -- if it's
5 acceptable to use the restroom and have a cup of coffee and
6 get some fresh air, you know, whatever constitutes a break
7 for somebody, if that is permissible or impermissible or --

8 A No, we allow that. They're welcome to get a cup
9 of coffee or candy bar. There's vending machines there.

10 Q And actually, as I understand it leave -- gate
11 4, actually leave the island for 10 or 15 minutes?

12 A And walk outside, yeah. The restroom is in the
13 next building.

14 Q The next office building?

15 A Yes.

16 Q But they don't have to take their 10 or 15
17 minute break in the island at the gate post?

18 A No.

19 Q Now, are you aware of any written guidelines
20 with regards to -- strike that. I've already asked that.
21 Are you aware of any oral guidelines as to how a lunch
22 break is to be taken, how someone is, while they are on
23 that eight hour shift, is to consume food?

24 A They are to bring it with them. It's their
25 responsibility that they feed themselves.

1 A In looking at it that way.

2 Q That's a yes?

3 A Yeah.

4 Q Now, are you familiar with any Utah State laws
5 or industrial commission guidelines, laws or regulations
6 with regards to whether employees have to -- what type and
7 what manner of breaks or lunch breaks they're supposed to
8 get in a work day?

9 A Yes, I am.

10 Q And tell me about that.

11 A My knowledge, they are allowed time for their
12 breaks, which we provide them.

13 Q And tell me by "breaks," what kind of breaks are
14 you referring to?

15 A Running to the restroom.

16 Q Any other type of breaks?

17 A No.

18 Q Is there anything in there where they are also
19 allowed a rest break, or what's commonly called a coffee
20 break?

21 A No.

22 Q Is there anything in there where the guidelines
23 or regulations suggest that they are entitled to a lunch
24 break on an eight hour shift?

25 A They are entitled to time for lunch, to my

1 knowledge of it, but it's not necessarily something they
2 need to leave the facility to do.

3 Q As I understand it, as it's set up, when people
4 log in initially and then log out at the end of an eight
5 hour shift, there is no logging out for any of these type
6 of breaks, correct?

7 A Right.

8 Q And if one is going to eat a lunch or take a
9 lunch break that is while they are still on duty?

10 A Yes, it is.

11 Q And still responsible to carry out the functions
12 they have been assigned?

13 A Right.

14 Q Now, I assume that if you've got two people at
15 gate 4 on the day shift rather than just a single person at
16 a gate, that that would not be a situation where the roving
17 person would come around and provide any type of relief for
18 a restroom break?

19 A No need for it, but it is available if they need
20 it.

21 Q But it isn't routinely done, is it?

22 A No.

23 Q And routinely, are you aware of a practice or
24 oral policy as to how long a restroom break can take and be
25 reasonable?

1 A It's understood down there 10, 15 minutes.
2 Q And as I understand it, they don't log out for
3 those 10 or 15 minutes?
4 A No, they don't need to. They're not leaving the
5 facility.
6 Q And they are readily accessible if they're
7 needed?
8 A Correct.
9 Q They can -- wherever they are taking their
10 restroom break they can be gotten very quickly?
11 A Yes.
12 Q And thereby respond to what needs to be
13 responded to?
14 A Right.
15 Q Hence, they don't need to check out?
16 A No.
17 Q In addition to a -- when we talk about this 10
18 or 15 minute break, is that sort of a half restroom break
19 half coffee break, rest break?
20 MR. WILLIAMS: Well --
21 Q (By Mr. Harris) Or is it just a restroom break?
22 MR. WILLIAMS: I'll object to the form of the
23 question, vague and ambiguous. If you understand it, go
24 ahead and answer.
25 THE WITNESS: I don't. Are you asking me are

EXHIBIT 3

EXCERPTS OF KENNETH H. MAYNE'S DEPOSITION

1 break, breakfast break, whatever the shift you're on, what
2 arrangements are made for that type of break?

3 A Only as time allows. They can eat their lunch
4 but there is not a specific set time or schedule for such
5 event.

6 Q And is it also like latrine and coffee break,
7 that's not something that they would check in and out, log
8 in and out?

9 A That's correct.

10 Q They would remain basically on duty during that
11 period of time?

12 A Correct.

13 MR. WILLIAMS: I'm going to object to the form
14 of the question as vague and ambiguous in it does not
15 define space or time. If you want to clarify that, if not
16 we'll clarify, but I want that objection on the record.

17 Q (By Mr. Harris) I could not find, after reading
18 this inch and a half material, anywhere where it talked
19 about breaks, lunch breaks, coffee breaks, even latrine
20 breaks. Are you aware of any -- in any of the information
21 that's been supplied to me as to whether there are any
22 written policies, procedures, post orders, any documented
23 evidence of break policy, lunch break policy, coffee break
24 policy, latrine break policy?

25 A Not that I'm aware of.

1 Q Have you ever had that in Burns Security?

2 A Not that I'm aware of.

3 Q Okay. If there isn't anything in writing is
4 there any oral policy at Geneva back in 1988, prior to the
5 date of this accident, as to what the oral -- first of all,
6 was there any oral policies with regard to breaks: lunch,
7 coffee, latrine?

8 A I don't know what oral policy would have been in
9 place if one in 1988.

10 Q I don't understand your answer. You're saying
11 you're not sure whether there was or was not one?

12 A I'm not sure.

13 Q And if there was one you're not sure what it
14 was?

15 A I'm not sure if there was one what it stated.

16 Q And who would I ask that? Who could tell me
17 that?

18 A Probably Kim Hancey and the captain.

19 Q Generally are there any oral policies or
20 instructions that come from your level down to the captain
21 and Hancey level with regards to breaks?

22 A No, none that I can recall.

23 Q Not in your full six years?

24 A Not that I recall.

25 Q Had you ever worked at gate 4 before?

1 A Not for the personnel at the north gate.

2 Q You don't know one way or the other?

3 A I don't know that they have, no.

4 Q Or that they haven't?

5 A Or that they haven't prior to this accident, no.

6 Q Do you know whether -- there are the other gates
7 down more towards the Center Street area of Geneva, are you
8 familiar with what I'm talking about?

9 A Yes.

10 Q Where the Phillips station is?

11 A Yes.

12 Q There's also been a restaurant and a cafe there
13 for a number of years as well?

14 A Correct.

15 Q Are you familiar as to whether any Burns
16 Security employees have utilized that restaurant for a
17 latrine break, coffee break or lunch break; and I'm talking
18 about an individual basis rather than simply going over
19 there to pick up meals?

20 A Yes, in fact, I've conducted meetings at that
21 particular restaurant.

22 Q And that restaurant is? I don't remember the
23 name of it.

24 A I believe it's Low-Downs is what it's called
25 now. A real sleezy place.

1 truck stop, cafe or it's predecessor -- I know that's gone
2 through a lot of construction -- was it opened during that
3 period of time?

4 A Yes, it was.

5 Q And did you personally ever have occasion to
6 frequent that establishment for coffee breaks or lunch
7 breaks in your eight month --

8 A In the scope of my duty, yes.

9 Q And in the scope of your duty would be what?

10 A At the time that it was a USX operation it was
11 the responsibility of one of the roving patrolman to pick
12 up and distribute lunches throughout the -- mill throughout
13 the USX employees that were being held over for overtime
14 and I on numerous occasions have picked up and distributed
15 lunches.

16 Q Okay. And that would be -- and that was done
17 either by you or by whoever was involved in the roving --

18 A Correct.

19 Q -- assignment? While you were working at gate
20 4, ever have an occasion while you were on shift still
21 booked in and not booked out to personally, not for
22 overtime people or for -- as in the roving capacity, ever
23 go to that cafe or its predecessor for a break, coffee
24 break or lunch break?

25 A It's possible. I don't recall specifically.

1 A I don't think so, no.

2 Q Fire?

3 A I don't believe so unless it was of great
4 magnitude.

5 Q If they were needed and the captain required
6 them to then they would leave?

7 A They would respond.

8 Q Fire extinguisher inspection and refills?

9 A They would not.

10 Q Gate openings?

11 A No. They would, yes.

12 Q Patrol breaches of security?

13 A Patrol the immediate area, no, no. The answer
14 to that would be no.

15 Q Other than generally to go out and patrol the
16 whole area no, correct?

17 A They do not.

18 Q And other than if they were going to generally
19 inspect a stone's throw around them, then they could; we
20 already talked about that?

21 A No, at that specific gate they would not either.
22 They wouldn't do that either.

23 Q Can you give me a general yes there would be
24 times when they would leave and then -- I tried to get
25 specific about the list that we went down. Are there other

1 reasons when they would -- one person would leave?

2 A Yes, for a latrine break.

3 Q Okay.

4 A That's the only time I can think of.

5 Q And at gate 4, where do they scurry to?

6 A There's a building, an office building that's
7 located right here and they would leave --

8 Q Why don't you write office building right next
9 to that if you would, please?

10 A They would go to here or they could come down to
11 here. There's a restroom facility in there as well.

12 Q You're pointing to the foot traffic post?

13 A Correct.

14 Q Are you personally aware of occasions when
15 someone during the day shift has had to respond to a
16 medical emergency, one of the two at gate 4?

17 A None that come to mind.

18 Q Am I understanding that what you're saying is
19 your general understanding is that they wouldn't, but they
20 might, there may be -- there may have been an occasion
21 where they could have?

22 A They could have? That I'm not aware of.

23 Q Your answer would be the same with regard to
24 fire?

25 A Correct.

1 Q Would your answer be the same with regard to
2 inspection of fire extinguishers?

3 A Correct.

4 Q Gate option?

5 A Correct.

6 Q And patrol?

7 A Correct.

8 Q Now, the fire station that you talked about,
9 where the captain's office is, what is that, at the fire
10 station I assume fire trucks and fire --

11 A Fire trucks, fire extinguishers, ambulance.

12 Q And where is that located at the plant?

13 A Centrally located. There's actually two fire
14 stations.

15 Q And I assume if there were some type of a fire
16 or a problem, then the different parties who are assigned
17 that task would then respond to one of the two fire
18 stations, get their equipment and go and attend to the
19 problem?

20 A Correct.

21 Q What type of communications are set up between
22 the different officers?

23 A Telephone at all of the gates, two-way radios at
24 some of the gates.

25 Q Do you remember which gates?

1 A Gate 1 is equipped with both telephone and
2 radio. Gate 2, I believe, is two-way and phone. Gate 3 is
3 strictly phone. Gate 4 is definitely phone and possibly a
4 two-way radio. Gate 5 phone, and gate 6 could possibly be
5 radio and phone.

6 Q Are the vehicles also equipped with --

7 A Yes, they are.

8 Q -- with a radio so they can speak to the
9 different posts?

10 A Yes, they are.

11 Q And I assume the captain's station?

12 A Yes.

13 Q Which is at the one fire station?

14 A Correct.

15 Q There is some documentation about how different
16 officers are assigned hand-held but they are hip held
17 two-way radios?

18 A I don't understand the question.

19 Q Are the individual officers also assigned
20 radios, the ability to speak?

21 A Depending -- no, not everyone has a radio, no.

22 Q You know which ones do and which ones don't?

23 A The gate 1 is a base station. It's not
24 portable. Gate 2, I believe, is a portable. Gate 4 if
25 they have one would be a portable; I'm not sure that they

1 And generally, other than the obvious means of
2 communication, do you have some general specific purpose of
3 those radios, what they're for, what they provide?

4 A The radio is communication to alert and respond
5 officers to various locations for emergency or
6 investigation.

7 Q Anything else?

8 A I can't think of anything, any other reason that
9 they would have them.

10 Q Would it be just the general reason of keeping
11 in touch, having the ability to keep in touch with
12 everybody all at once?

13 A Correct.

14 Q When one takes a latrine break do they have to
15 chart out? I noticed on a lot of the log books where it
16 said you are in, you're out, you're here and those
17 different type of places. Do they have to log out to take
18 a latrine break?

19 A No, they do not.

20 Q When they report on their shifts here at Geneva
21 is it a straight eight hour shift?

22 A No, some of them vary. Some of the gates are
23 strictly shift change, which is for part-time personnel
24 only. Some shifts the lieutenants work are 10 hour shifts,
25 not all, but some. So for the most part the shifts are

1 eight hours but there are some that are two and three hours
2 for shift change and lieutenants, I believe, one day a week
3 work -- one day a week work a 10 hour shift.

4 Q And as I understand it, when somebody comes they
5 have -- if they get there a few minutes early they have to
6 log in and say Jane Doe is here?

7 A Yes.

8 Q And then they have the situation where the one
9 on duty transfers keys or whatever else needs to be
10 transferred, that's noted?

11 A That's correct.

12 Q And he says off duty?

13 A That's correct.

14 Q And then the Jane Doe at that point in time
15 charts in and says they're on duty?

16 A Correct.

17 Q And do I understand it they remain on duty for
18 the entire eight hours until such time or however long
19 their shift is until they leave?

20 A Correct.

21 Q And then they would chart out?

22 A Correct.

23 Q And in the same reverse procedure that we just
24 talked about?

25 A Correct.

1 Q And as I understand it they do not log out for
2 latrine breaks?

3 A They do not.

4 Q Okay. Are there any other types of breaks that
5 are allowed?

6 A There are not that I'm aware of.

7 Q Okay. There are no procedures? A lot of
8 companies have 10 minute breaks in the morning and 10
9 minute breaks in the afternoon, coffee break type of
10 situation.

11 A There are none that are scheduled.

12 Q Are they allowed those type of breaks? I guess
13 it would be depending on the circumstances; the
14 requirements of the gate have to be met and if they're busy
15 there's no break?

16 A That's right.

17 Q And if it's not so busy and there's an
18 opportunity then they can take a coffee break?

19 A Correct.

20 Q And that would also be the type of break where
21 they would not log out?

22 A Correct.

23 Q Similar to the latrine break?

24 A Correct.

25 Q Now, with regards to a lunch break, dinner

1 break, breakfast break, whatever the shift you're on, what
2 arrangements are made for that type of break?

3 A Only as time allows. They can eat their lunch
4 but there is not a specific set time or schedule for such
5 event.

6 Q And is it also like latrine and coffee break,
7 that's not something that they would check in and out, log
8 in and out?

9 A That's correct.

10 Q They would remain basically on duty during that
11 period of time?

12 A Correct.

13 MR. WILLIAMS: I'm going to object to the form
14 of the question as vague and ambiguous in it does not
15 define space or time. If you want to clarify that, if not
16 we'll clarify, but I want that objection on the record.

17 Q (By Mr. Harris) I could not find, after reading
18 this inch and a half material, anywhere where it talked
19 about breaks, lunch breaks, coffee breaks, even latrine
20 breaks. Are you aware of any -- in any of the information
21 that's been supplied to me as to whether there are any
22 written policies, procedures, post orders, any documented
23 evidence of break policy, lunch break policy, coffee break
24 policy, latrine break policy?

25 A Not that I'm aware of.

1 today, disciplined in any manner?

2 A Yes, I am.

3 Q Prior to this accident?

4 A Yes, I am.

5 Q And tell me about that.

6 A I observed one of my patrol vehicles on State
7 Street in Orem at approximately 11 p.m. 11:30, the time and
8 date I don't know. I immediately, the following day,
9 contacted the captain, and I instructed him I wanted to
10 know why that vehicle was uptown. And they determined that
11 that individual had slipped home for a minute, and he was
12 disciplined for it.

13 Q All right. Other than that occurrence, are you
14 familiar as to whether anyone had ever been disciplined who
15 had been working at gate 4 on the day shift and had left
16 momentarily to go to the Frontier Cafe, pick up their lunch
17 and bring it back and to eat it there on the post?

18 A I don't recall any.

19 Q Was it ever discussed with you by your captains,
20 lieutendants, client service supervisors, as to whether one
21 should be disciplined for doing something that I just
22 described?

23 A I don't recall ever discussing that with either
24 of those two.

25 Q Did you discuss it with anybody?

1 A Not that I recall.

2 Q Do you know whether Gloria Swenson was
3 disciplined after arising out of the circumstances here on
4 July 26, 1988?

5 A I don't recall. I don't believe that she was.

6 Q Was that a decision by you?

7 A It could have been. I don't recall why she
8 would have been or why she wasn't. I'm almost positive
9 there was no discipline, there was no discipline
10 administered by me, and I'm not aware of any by supervisor
11 captain, lieutenants.

12 Q That would have gone across your desk?

13 A That's right.

14 Q Was it ever discussed with you as to whether
15 there should be discipline or not under these circumstances
16 with Gloria Swenson?

17 A No, it was not.

18 Q Did you have an opportunity to review her
19 employee file?

20 A I'm vaguely familiar with some of the items that
21 are in it, yes.

22 Q I couldn't find any kind of written reprimand or
23 probation.

24 A I don't recall disciplinary problems with her.

25 Q Was there any type of verbal policy that you're

1 A I don't.

2 Q I see "appendix" it even says.

3 A The basics are the -- this is a workbook that
4 the officers view when they are watching a video, make
5 notations during the video, and at the end there's a test
6 that's administered.

7 The other document that you have is our policy
8 and procedure for the Salt Lake district but I'm not sure.

9 Q But you're not aware of what this Basic
10 Employment Guide referred to here is?

11 A No.

12 Q It's not something that you've referred to or
13 worked with?

14 A Not that I recall even specifically. What it's
15 called Basic Employment Guide? I'm not familiar with what
16 that is. I'm assuming it must be --

17 Q It says, "see appendix Basic Employment Guide
18 for 8 Step Hiring Process"?

19 A I'm not familiar.

20 Q In looking at the disciplinary policy here in
21 the handbook for security officers, I think there's also a
22 disciplinary policy in the regulations, policies and
23 procedures?

24 Uh-huh.

25 Q It seems like they went over each other. In

1 reviewing those, I'm sure you're familiar with them. I'm
2 happy to let you look at them on page 44, 45, 46 and 47. I
3 could not find anything in there that referred to breaks,
4 lunch breaks, violations of with regards to those type of
5 issues. I just wanted to make sure that I wasn't missing
6 something.

7 A I don't recall any in here that's listed.

8 Q And while we're at it, if you could pull out
9 page 17 of the regulations of policies and procedure. It
10 also has a laundry list there of items on two, three pages
11 that -- and I would like to ask the same question. I
12 couldn't find anything there either.

13 A What specifically are you referring to on 17?

14 Q I'm just wondering -- 17, 18 and 19 as far as
15 that, over to page 20, if there are any topics in there
16 that are subjects for disciplinary action that refer to
17 breaks, lunch breaks, coffee breaks, those issues?

18 A None that I recall. I don't see any.

19 Q You're welcome to take a minute and look at all
20 of those to be fair to you.

21 A And the question being specifically breaks,
22 lunch breaks.

23 Q Yeah, somehow if you violated the, you know, the
24 standard policies for those, concerning those --

25 A On page 19, item 3.

1 Q And let me just clarify that answer. You
2 indicated yes there have been times where you've actually
3 held meetings there?

4 A Yes.

5 Q And I assume those are meetings with the captain
6 and lieutenants?

7 A Yes, exactly.

8 Q Not with the general security officers?

9 A Not that I ever recall, no.

10 Q And let me ask a little more specific question.
11 Are you aware either through your lieutenants or captains
12 or through Kim Hancey as to whether the Low-Down has been
13 used by any of the security officers for a latrine break,
14 coffee break or lunch break? You're not aware one way or
15 the other?

16 A No, I'm not aware of quick, short or otherwise.

17 Q Do you know if there are any other restaurants
18 in close proximity on Geneva Road other than the Frontier
19 that's here on Exhibit 2 and the Low-Down?

20 A I don't believe there are.

21 Q I guess unless you wanted to eat at Bunkers Feed
22 or somewhere near Fourth North.

23 A Dairy mash.

24 Q Get some Dairy mash. Do you know if prior to
25 this, the date of this accident, that was July 26, 1988, as

1 to whether there were any written post orders that would
2 prohibit a security officer from utilizing either of these
3 two restaurants as a coffee break place, latrine break
4 place or to stop to get a quick lunch?

5 A Specific instructions, I'm not aware of any.

6 Q And the same question with regards to any
7 non-written instructions?

8 A I am aware there are has been verbal statements
9 that they are not to leave the shift, leave their site. We
10 have a number of our documents that state that they are not
11 to leave their assigned post unless it's the end of the
12 shift or properly relieved.

13 Q And do I understand -- and I think I understand
14 that generally. What I'm trying to do is understand if
15 that applies to latrine breaks.

16 A And I don't know what -- I don't understand the
17 question.

18 Q Obviously if you assign people to a post you
19 would like to have them there to make sure that the job is
20 being taken care of, and the employer is being -- his needs
21 are being satisfied, correct?

22 A Let me clarify, maybe that will answer your
23 question. All of the gates are equipped with a restroom
24 facility at the post with the exception of the north gate,
25 that being the island gate. It does not have the restroom.

EXHIBIT 4

EXCERPTS OF OREON G. CLSEN'S DEPOSITION

1 said no one's going to leave Geneva property and go anywhere
2 to get lunches basically. I mean I don't remember the exact
3 words, but it said don't do that any more, effective
4 immediately don't do this any more, but prior to the time of
5 Gloria's accident do you know of anyone ever getting
6 reprimanded for doing that?

7 A No, not that I can recall.

8 Q Do you recall anyone ever coming up and saying you
9 guys can't do that, no one here is to go over to the Frontier
10 Cafe and get a lunch?

11 A Not personally that I can recall anyone ever telling
12 me that, but I can't answer for the other people or the other
13 lieutenants on the other shifts.

14 Q But it is fair to say that your manuals say you are
15 not to leave your post while on duty, true?

16 A True.

17 Q Were you on duty the day this accident took place?

18 A Yes.

19 Q Were you the other guard at gate four?

20 A Yes.

21 Q As best as you can, okay, and I realize we're asking
22 you to go back now until July of 1988 which isn't really fair
23 to anybody, all right, but asking you to do that as best you
24 can, tell me what you remember about what happened that day.
25 And obviously I don't want you to start at 8:00 a.m. in the

1 A Yeah, that would be.

2 Q And if they walk 70 yards back to a truck to see
3 whether or not there is something on the truck that matches or
4 doesn't match, even though they're not right at gate four,
5 they're still considered to be at their post; isn't that true?

6 A Yes.

7 Q Because they're still fulfilling their
8 responsibilities; isn't that true?

9 A Yes.

10 Q And they're still wearing their uniform and being
11 highly visible; isn't that true?

12 A That's true.

13 Q Now, you were also expected to basically bring in
14 your lunch and eat at your post; isn't that true?

15 A Well, we normally brought our lunch to eat, yes.

16 Q Okay, you normally brought your lunch to eat. What
17 happens if you normally didn't bring it one day? One day you
18 didn't bring your lunch. What did you do?

19 A Well, you either went without or had someone get you
20 one.

21 Q Who would get you one?

22 A Well, sometimes the guard in the car.

23 Q Where would the guard in the car go to get you some
24 lunch?

25 A Across the street to the cafe.

1 Q So it was not unreasonable to think that the guard
2 in the car might go get lunch over at the cafe and bring it to
3 you? Would that be true?

4 A Well, if the time came, and once in awhile it may
5 happen, but --

6 Q Did it happen once in awhile?

7 A Well, never to me, but I can't answer the others,
8 but that would --

9 Q Did you ever see it happen for anybody else at gate
10 four? That one's tough, isn't it?

11 A Yeah.

12 Q That one's tough because it calls for you to
13 remember a long time back, and also that's a tough one because
14 that's really the construction of the whole lawsuit, right,
15 everything here in a nutshell? Do you personally know of
16 other people going over to the Frontier Cafe to get lunches
17 for guards at gate four?

18 MR. WILLIAMS: Are you saying for other guards other
19 than themselves personally?

20 Q (By Mr. Patton) I'm saying do you know of any
21 guards going over there for themselves or going over there for
22 others to get lunches for guards who are working gate four?
23 Now, you've indicated it never happened for you, and I'm
24 assuming that's why you're still working there, okay? Because
25 obviously they're very happy with you, all right? But I want

1 to know if you ever personally saw it happen.

2 A No, because during my time of the shift I had, no,
3 there was no time that I can recall someone else that I worked
4 with calling to have anybody go pick them up a lunch.

5 Q Do you ever remember seeing anyone working your
6 shift run across the street or drive across the street and get
7 their own?

8 A Well, yes.

9 Q And who was that?

10 A Well, that's when this accident happened, the day
11 that Gloria went.

12 Q Was there anyone besides Gloria who ever went and
13 did that? Not you, but did you see anyone else ever do that
14 besides Gloria?

15 A Well, I know of incidents where some have done it.

16 Q Do you know the names of some of these people who
17 have done it?

18 A Well, there's only two or three of us that have
19 worked that gate very long and there's others come and go, and
20 for three, four years to try and remember their names, I just
21 don't remember them.

22 Q Do you know if Gloria saw other people doing it?

23 A I can't answer that for her.

24 Q Well, see, I know for a fact that there was that
25 little communication that came out after the accident that

1 Q Do you consider that to be off your post?

2 A Well, yeah, it would have to be off because it's not
3 on the premises.

4 Q If anyone went over on their time as a Burns guard,
5 would you consider that to be on their own time, if they went
6 over to the cafe to pick up lunch for themselves?

7 A Well, yes, I'd have to say that they would be on
8 their own time.

9 Q Would you consider that to be their personal errand
10 for themselves, as opposed --

11 MR. PATTON: Objection, calls for speculation, calls
12 for a legal conclusion. That's what the issues are all about.

13 MR. WILLIAMS: You can go ahead and answer. You've
14 answered his questions about legal conclusions.

15 THE WITNESS: Repeat that for me.

16 Q (By Mr. Williams) Would you consider a guard going
17 over to pick up lunch to be on their own time, personal
18 errand, as opposed to company business?

19 MR. PATTON: Same objection.

20 THE WITNESS: Well, let me put it this way. It's a
21 little different than running over to the billing office to go
22 to the john, but I think that it takes about the same amount
23 of time. The only difference that I can see is the fact that
24 the cafe is off the premises.

25 MR. WILLIAMS: Okay. No further questions.

1 the form of the question as being vague and ambiguous, as well
2 as argumentative.

3 Q (By Mr. Patton) Isn't it true?

4 A I can only answer for who I work with. See, I work
5 with one person at a time, other people come on. I can't
6 answer for what they do after I leave, whether they call. I
7 could go over and get a lunch or have someone pick it up. I
8 can only answer for the time that I am in the guard house
9 myself with someone else. If someone else does it --

10 Q And you've worked there seven years, true? Now,
11 sir, you're not a party to this action.

12 A Oh, I understand that.

13 Q You're not a good guy or bad guy, not wearing a
14 white or black hat. I'm just asking you, based on what you
15 know to be the truth, and the fact of the matter is it really
16 wasn't that unusual -- it may have been unusual for you, okay?
17 But based on what you know and seven years of experience, it
18 really wasn't that unusual for a guard at gate four, when
19 there were two guards on duty, to call over to the Frontier
20 Cafe and order food and rush over and get it and rush back;
21 isn't that true?

22 MR. WILLIAMS: Let me object. I think the use of
23 the word isn't that unusual is vague and ambiguous and calls
24 for an answer that could run the whole spectrum, and so I'm
25 going to object on that basis.

1 morning. I want you to start just before Gloria leaves the
2 gate, the exact Island gate itself, and what you remember she
3 said, she did, what happened, where she went, whether she came
4 back, whether or not you saw the accident, what happened.
5 Just tell me everything you remember happening that day.

6 A Well, I recall that she said she needed to have a
7 little bite to eat because I don't think -- as I recall, she
8 may not have had a lunch that day, for whatever reason I don't
9 know. She mentioned that I'll -- normally we always call.
10 Now, I can't recall whether she phoned ahead or not at that
11 particular time. We were busy, but at least the incoming
12 traffic were busy, and that's the side I was sitting on. So
13 she says, well, I think I'll run over and grab a bowl of soup,
14 whatever it was, and be right back. So she was going to walk,
15 she started to going to walk, and she says, well, I'll take
16 the car so I can get back quicker, and that's the last I seen
17 her because after the accident I didn't see her for, I guess
18 it was a good week or better after that.

19 Q Did you see the accident?

20 A No. I seen some confusion up there after, but I
21 never seen the accident.

22 Q Was she getting you any lunch or any rolls or any
23 doughnuts while she was up there?

24 A No.

25 Q Just for herself?

EXHIBIT 5

EXCERPTS OF GLORIA SWENSON'S DEPOSITION

1 Q Tell me, would you sometimes bring your lunch?

2 A Sometimes. We had no policy that you could not leave
3 or anything else. And we just went across the highway to get
4 our lunches a lot of the time.

5 Q When you say "we would go across the highway to get
6 lunches", how often would you personally go across the highway?

7 A I had probably made two or three trips, and then the
8 different guys we worked with, we just took turns. One or the
9 other of us would go.

10 Q So this was something that you do occasionally but
11 not every day; is that correct?

12 A Not every day but it was often.

13 Q Tell me where you considered your post to, be what
14 you understood your post to be when you were a guard on duty at
15 the island gate.

16 A My duty?

17 Q Yes. The area where you were supposed to work.

18 A Was to, like I said, check in the trucks, check the
19 loads, watch as they go out.

20 MR. HARRIS: You mean like area, spatially versus
21 --

22 Q Let me clarify that just so that we are all clear on
23 the record. Where did you understand your area of work was to
24 be when you were told you were stationed at the island gate?

25 A Okay. We had a little TV screen in there so we

1 under glass with other stuff. We had it on the wall. We had it
2 down at the gate.

3 Q It was even in both locations?

4 A Yes. It's at all the gates. There is a posting of
5 all the restaurants around.

6 Q Is that where you got the phone number is off that
7 menu so you could call?

8 A Yes.

9 Q Now prior to the time of this accident, did you have
10 knowledge one way or another as to whether the lieutenants, the
11 supervisors, the people above you knew that you and, to your
12 knowledge, others had gone, were going over to Frontier on
13 occasion to get their lunch?

14 MR. WILLIAMS: Objection.

15 A I'm sure they did. The lieutenants themselves went
16 there.

17 Q There has been some testimony from other witnesses
18 that there were even meetings held at the Frontier Cafe between
19 the lieutenants and the captain and company officials from Salt
20 Lake. Were you aware of that?

21 A Yes, I was. I know a time Burns people have met and
22 went there.

23 Q Did you personally ever attend any type of a meeting,
24 formal or informal, at the Frontier Cafe?

25 A On duty? While I was on duty?

1 Program and Burns Regulations, Policies and procedures, I wasn't
2 able to find anything that specifically dealt with lunch breaks
3 or coffee breaks or --

4 A I don't recall anything either.

5 Q Do you remember any policy one way or another on
6 lunch breaks or -- and by policy I mean oral policy, spoken or
7 written, on lunch breaks or coffee breaks or potty breaks,
8 anything to do with that.

9 A When you can get them, you take them. That's all I
10 was ever told and that was, like I say, many days if --

11 Q Do you know if during the time you were employed at
12 Burns as to whether the lieutenants themselves in their own cars
13 went to the Frontier Cafe and picked up food or lunches for any
14 of the Burns employees?

15 A In their own car?

16 Q In their company car while they were on duty.

17 A Not for us, but maybe for the lieutenants and the
18 captain's meeting.

19 Q As I understand it, there are occasions when there is
20 --

21 A I brought food back to my own lieutenant many times.

22 Q From Frontier Cafe?

23 A Yes.

24 Q And he would pick that up and eat it in his car or
25 sit there in the island post?

1 Q Were there occasions when -- you have testified a
2 couple of times today that there were occasions when people at
3 Gate 4 would take turns to go over to the Frontier Cafe and pick
4 up lunches for each other, correct?

5 A Yes.

6 Q And you talked about how you did that?

7 A Yes.

8 Q There were times when you walked to go do that?

9 A Yes.

10 Q And times you took your own car?

11 A Yes.

12 Q And were there other times when the other person
13 walked?

14 A Yes.

15 Q And other times when the other person got in his own
16 car to go do that?

17 A Yes.

18 Q Do you have information one way or the other, yes or
19 no, as to whether the lieutenants or any of the other
20 supervisors knew of this situation where you and other parties
21 at Gate 4 used their own vehicles to hustle over to the Frontier C

22 A I'm sure they did.

23 Q In looking through the documents that they gave me,
24 and, again, that's a handbook for security officers -- you are
25 welcome to look at this stuff -- Burns Security Orientation

1 A We would usually meet at the fire station. This is,
2 like I say, on graveyard when things were slow or something, but
3 I did actually bring food back for my lieutenant.

4 Q Gate 4 during the day shift has two people, correct?

5 A Yes.

6 Q Then there are times when there is only one person?

7 A Swing shift.

8 Q And other gates there is only one person at the gates
9 when they are open, correct?

10 A Yes.

11 Q Do you have any information one way or another if the
12 lieutenants would have picked up lunches for the single staff
13 people, in other words, where they couldn't leave the place
14 unmanned and go over and get something to eat?

15 A My lieutenant didn't. Usually Car 7 and Car 8
16 brought it back to all of us.

17 Q Including the other --

18 A We would always check with the one on the gate, Would
19 you like something.

20 Q And that's not just Gate 4; that would be the other
21 gates as well?

22 A Yes. Sometimes on the graveyard we would always
23 check with Gate 4. My lieutenant was a real stickler, you keep
24 in touch with everybody, make sure everybody is okay. We always
25 would check in on the Gate 4 person up there by themselves. Gate

1 2 is clear down the other end of the plant.

2 Q And as you saw it, in Car 7 and 8 that was part of
3 your responsibilities, to check on these folks and make sure
4 they are all right?

5 A Yes.

6 Q Including if they need something to eat or something
7 to drink? There are occasions --

8 A I don't understand that as policy, no, but if we were
9 going to get us a drink, yes, we would ask them.

10 Q And that came from instructions from your lieutenant?

11 MR. WILLIAMS: Objection. Leading.

12 A To make sure everyone is okay, yes. We had radios.
13 Even if it was -- there was many times we would be called, Hey,
14 go check Gate 4. I can't reach him on the radio. He had no
15 relief. If he went to the restroom or something else and we
16 couldn't reach him, of course you suspected something is wrong.

17 Q There has been some testimony in this record about
18 radios and it's still not -- at least not clear in my mind. At
19 the time of this accident in '88, July of '88, what type of
20 radio system did you have there between the --

21 A Absolutely none to the island gate.

22 Q My question was there is some documents about little
23 hand-held walkie-talkies, hip-held walkie-talkies.

24 A Yes.

25 Q Were those in existence as of July of '88?

1 Q And then when your shift came up, the end of your
2 eight hours, actually about eight hours and 15 minutes, I guess,
3 the other person would log in about 15 minutes before you would
4 log out?

5 A Yes.

6 Q And your understanding was you were paid for each and
7 every minute you were being employed there for those eight
8 hours?

9 A Just the eight hours, yes, not the 15 before the
10 eight hours.

11 Q You were not docked for any time that you had to go
12 to the restroom?

13 A No.

14 Q You were not docked for any time or deducted for any
15 time that you spent sitting eating a sandwich or something at
16 the post?

17 A No.

18 Q Or from having a candy break or coffee or coke break?

19 A No.

20 Q Now other than the time when you were operating Car 7
21 or 8 -- were those company cars?

22 A Yes.

23 Q Were those cars that were basically left there at the
24 plant?

25 A Yes.

1 A Who was the lieutenant on duty?

2 Q Did you look to him as your supervisor?

3 A Nobody ever come bothered us at Gate 4. We didn't
4 see the lieutenants and stuff when we were up there. They were
5 mostly down with the guys inside.

6 Q Who was the lieutenant on duty that day, if you
7 recall?

8 A I think it was Jim Hoyt, but I'm not sure.

9 Q Jim Hoyt?

10 A Yes.

-11 Q Tell me, if you could, just how your day progressed
12 from the time you came on the job up to the time of the
13 accident, on the day of the accident.

14 A Okay. It was busy, usually is at that station.
15 Trucks are coming real heavy. They are backed up clear to the
16 highway. About quarter after 11:00 it just -- you almost --
17 like there is 20 minutes you will get a break. I guess the
18 truckers go to lunch is all we can figure.

19 Q But it was pretty consistent that you would have a
20 break?

21 A Well, it would come at different times, but at about
22 a quarter after I asked Oly, I says, Are you ready for lunch.
23 And he says, No, I don't think I have or want one today. And I
24 says, Okay, it looks like there is a break out there. I think I
25 will go get me a cup of soup.

1 Q Okay.

2 A Because it's the only time you had anybody with you.

3 Q All right, but at least on the day in question you
4 were not -- you merely went over there for yourself?

5 A For myself. I had asked Oly if he wanted anything
6 and he said no. He had his lunch that day.

7 Q Have you talked to anyone after the accident and
8 before today about this lawsuit?

9 A My lawyer.

10 Q Besides your lawyer?

11 A No.

12 MR. WILLIAMS: Those are all the questions I have.
13 Thanks.

14 (Whereupon the taking of this deposition was concluded.)

15 * * *

16 Original deposition delivered to the witness.
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1 Q And it was all right within company policy for you to
2 --

3 A To go to the bathroom, yes.

4 Q We have also had some testimony from Hansey and
5 others that there was also appropriate -- in addition to any
6 time for lunch, there were also smoke breaks or coffee breaks or
7 candy bar breaks that would be appropriate if there was some
8 down time.

9 A If there was down time. Gate 4 -- yes. Big if.

10 Q Now when you were in any of your capacities either at
11 Gate 4 or at doing this Car 7 or Car 8 inside the plant,
12 security officer duties, did you ever have an occasion to go
13 over and pick up lunches for other employees?

14 A Yes, I did.

15 Q And let me make that a better question. Did you ever
16 have occasion to go over to the Frontier Cafe and pick up
17 lunches for employees?

18 MR. WILLIAMS: Objection to the use of the form
19 "employee". Vague and ambiguous as to who it refers to.

20 Q Let's break it down. I don't want to be vague and
21 ambiguous. I'm going to ask the question in a minute about BM
22 and TM employees versus Burns employees. During your time at
23 either Gate 4 or later in Car 7 or Car 8, did you ever have
24 occasion to go to the Frontier Cafe to pick up lunches for any
25 other Burns employees?

1 A Yes.

2 Q And the same question with regard to any BM and TM
3 employees.

4 A No.

5 Q And when you picked up lunches or food from the
6 Frontier Cafe, was that both in your capacity as a Gate 4
7 employee as well as later on when you were in Car 7 and Car 8?

8 A When I went when I was on Gate 4, it was just for me
9 and the person there, or they would pick up for me when they
10 went, yes.

11 Q And separating Gate 4, did you also have occasion
12 when you were in Car 7 and 8 to also when you went to the
13 Frontier also pick up a lunch or a drink or cup of soup?

14 A For any one of our employees?

15 Q Other Burns employees.

16 A Yes, we did. We tried to make sure we got it for
17 them if they wanted something.

18 Q Your understanding is that -- you correct me if I'm
19 wrong -- is that you got there 15 minutes early so that you
20 could log in before the other person logged out, correct?

21 A Yes.

22 Q And then that same thing happened to you at the end
23 of your eight hour shift?

24 A And you were talking about what had happened on the
25 shift before, what you needed to be aware of before they left.

EXHIBIT 6

EXCERPTS OF MICHAEL TRANSTRUM'S DEPOSITION

1 MR. WILLIAMS: Let me lodge an objection that
2 that is a mischaracterization of the prior testimony
3 and the record. Go ahead and answer.

4 Q (By Mr. Harris) Is that true?

5 A There have been management meetings, yes, at
6 either one of those places.

7 Q And management meetings, as I understand it,
8 would include people from Salt Lake, Ms. Hancey, Mr.
9 Mayne, or I guess currently Mr. Street, is it?

10 A Yes, that is true.

11 Q And those would be the upper management?

12 A Yes.

13 Q And then together with yourself and the
14 lieutenants?

15 A And/or the lieutenants. It was not a regular
16 thing.

17 Q How often do those types of meetings take
18 place at the cafes?

19 A Oh, once or twice a month, maybe.

20 Q Now, are there ever occasions when these
21 meetings included the security guards?

22 A Not to my recollection, not when I have been
23 there.

24 Q Are there ever occasions when you or your
25 lieutenants have meetings -- I am using the term

1 Q Now, are you aware that when someone is doing
2 the job of rover, as to whether it was authorized or
3 whether it was okay for them to stop and take a coffee
4 break or a rest room break at either of those
5 restaurants?

6 A To my knowledge, that has never been okay
7 based on my understanding of the post orders.

8 Q Okay.

9 A Specifically based on the January 11 Memo to
10 Post.

11 Q Thank you. And I will try to ask a better
12 question. Prior to the January 11, 1990 Post Order,
13 were you aware as to whether there was a practice of
14 the rovers that they did in fact take their coffee
15 break, or rest room break, or pick up a sandwich. I'm
16 talking about a small break, I'm not talking about an
17 hour break, or lunch hour, that type of thing, and the
18 rover, not Gate 4 or Gate 1, the rover took that break
19 at either of the restaurants?

20 A I am aware that I think at times that that
21 had happened.

22 Q And that was something that the lieutenants
23 were aware of, it was common knowledge?

24 A I would say, yes, common knowledge. I can't
25 tell you what they were aware of. I don't know what

1 A Okay. I understand what you are saying.
2 Yes, I was asked, "Do people leave the Plant?" The
3 answer to that is, Not to my knowledge. They
4 shouldn't. The post orders I felt were very clear that
5 they shouldn't.

6 Q And have you since found out one way or
7 another as to whether there were other instances at or
8 about this time for people to go over to the cafe?

9 A At about what time?

10 Q July of 1988. I'm talking about the months
11 and years before that, whatever had been going on
12 there.

13 A I have asked members of the guard force who
14 were employed at that time, "Have they ever left?" and
15 I received answers everywhere from, "No, that is
16 against the rules and regulations," and I think
17 probably at least two of them told me, "Well, I have
18 done that before."

19 Q On a number of occasions?

20 A Their answer was, "I have done that before."

21 Q And who was it that you spoke with that gave
22 you those answers?

23 A Oreon Olson.

24 Q Oreon?

25 A O-r-e-o-n.

1 Q Is he still employed by Burns?

2 A Yes, he is.

3 Q Is he a guard or a lieutenant?

4 A He is a guard.

5 Q And who else?

6 A Jim Bezzant.

7 Q And is he still employed?

8 A Yes, he is.

9 Q And is he a guard?

10 A Yes.

11 Q And did you talk with anyone else in the

12 guard force?

13 A I talked to the lieutenants that worked for

14 me.

15 Q And did you ask similar questions?

16 A I asked questions, yes, very similar.

17 Q And what answer --

18 A What are their understandings of it and their

19 answers to me were, "We shouldn't be doing that and we

20 don't do that."

21 Q Now, are they referring to themselves?

22 A Well, I have to say they are referring to

23 themselves and the people they are responsible for.

24 Q Were you given any information other than

25 Gloria's time in July and Oreon Olson and Jim Bezzant,

1 A Mark Nielson was one of the Gate 4 people, I
2 think that is what he told me, that that was a normal
3 job assignment, which was Gate 4. He worked that day.

4 Q Before we get to him, do you remember
5 anything else that you talked about with Oreon Olson?

6 A In that conversation?

7 Q Yes.

8 A No. I mean I talked to Oreon frequently, you
9 know, but --

10 Q Now, did Oreon ever indicate that he had done
11 that while he was stationed alone at a gate or was it
12 only done in the context of Gate 4 when there were two
13 people on shift?

14 A I don't think that that was discussed
15 specifically, you know. My common sense would tell me
16 that he couldn't do it alone because he would have to
17 leave his post totally unmanned to do that.

18 Q So if it did happen, you are assuming it
19 happened in a situation where there were two people on
20 duty and one remained on duty while the other slipped
21 over and got some lunch and slipped back?

22 A I would have to assume that.

23 Q And I assume you get that information from
24 your discussions with Oreon, and Mark, and Mr. Bezzant?

25 A Those people didn't give me times and dates.

1 Q Let me ask a better question. Busier times
2 than others.

3 A Yes, there are busier times.

4 Q And there are occasions when with two people
5 there, there are holes in the action, to put it your
6 way, where a break could be taken?

7 A That is true.

8 Q And Kim said that you don't want to take that
9 during shift when there are no holes in the action, I
10 think she said early in the morning when all the trucks
11 get there, that it is busy. Assuming that there is a
12 hole in the action and you have got two people on,
13 would that be a situation where it would be permissible
14 and acceptable for someone to take up to 10 or 15
15 minutes or longer to eat one's lunch?

16 A Yes.

17 Q And they would still be paid for that?

18 A Yes.

19 Q They would still be logged in or on the job?

20 A Yes.

21 Q Correct?

22 A That is true.

23 Q Are you aware as to whether you have been
24 involved in the discipline of anyone, and by discipline
25 I mean in a broad sense, reprimand, termination,

1 go on a smoke break, or a potty break, one hundred
2 yards away, doing whatever he is needing to do to
3 relieve himself, that the other person is still on duty
4 and that is still being manned? Correct?

5 A That is true.

6 Q And when that happens, when that type of
7 break happens, that does not violate paragraph 7 of
8 this July 1984 agreement, does it?

9 A As long as they are on company property, that
10 is true.

11 Q What is your understanding of the policy at
12 Burns on breaks? As I understand what happens, and I
13 reviewed this in the last deposition, and I don't want
14 to spend a lot of time doing it again. When somebody
15 reports to duty, they write that they have reported for
16 duty and the other person checks out and then they
17 immediately check in?

18 A That is true.

19 Q And then they are on for eight hours?

20 A That is true.

21 Q And the other person reports that he checks
22 in, the last person checks in, and the next person
23 checks in, and it just happens three times a day?

24 A Yes.

25 Q And they are on for eight hours?

1 A For a normal shift.

2 Q And they are paid for eight hours?

3 A Yes.

4 Q And basically there are three eight hour
5 shifts during the day and normally that is how you do
6 your crews?

7 A That is true.

8 Q Is there a written policy that you are aware
9 of as to any kind of practice, or oral policy in effect
10 with respect to the number of breaks, whether it is to
11 take a smoke break, lunches, coffee breaks, rest room
12 breaks? What is your understanding as to what the
13 practice is?

14 A Do you want me to give an explanation; this
15 type of an answer to that?

16 Q Yes.

17 A To my knowledge there is no written
18 description of what constitutes a break, or how many,
19 or when. I guess you would have to say breaks are
20 taken when you can get one, when you can find, you
21 know, a hole in the action, let's put it that way, to
22 do whatever it is you need to do, and depending on the
23 job. Some jobs require that a relief be given.

24 Q The rover or lieutenant, or somebody comes to
25 relieve them?

1 each man was aware of, you would have to ask them what
2 they were aware of.

3 Q I will. Now, prior to January 11, 1990,
4 either as you were in the scope of lieutenant or as the
5 captain, had you ever disciplined any lieutenant or
6 security guard for doing what Gloria did, or similar to
7 what Gloria did, going across the street, getting some
8 soup and coming back within a ten or fifteen minute
9 break?

10 A No, I have not.

11 Q Are you aware as to whether anybody has ever
12 been disciplined for that? I am talking about put on
13 probation, given a demerit point, given a reprimand,
14 anything within the scope of how Burns disciplines
15 their people, all the way up to termination? Are you
16 aware of anyone that that ever happened to prior to
17 January 11, 1990?

18 A I am not aware of any individual, no.

19 Q Are you aware as to whether there was any
20 action taken against Gloria for her leaving Gate 4
21 going however many yards it was over to the Frontier
22 Cafe and returning with her soup?

23 A I am not aware.

24 Q Did you ever have any conversation with Kim
25 Hancey, or Mr. Mayne, or Mr. Street as to whether there

EXHIBIT 7

EXCERPTS OF EUGENE S. BEZZANT'S DEPOSITION

1 Q (By Mr. Patton) If you don't know if there was one
2 and Mr. Olsen says he believes there was one, you have no
3 reason to consider him a liar, do you?

4 A I consider him an honest man.

5 Q Do you remember a memo coming down at anytime
6 stating that security officers, Burns Security Officers were
7 not to leave the plant to go get sandwiches or meals off of
8 Geneva property?

9 A I don't remember the exact time, but I do remember a
10 memo, yes.

11 Q Did it come out after Gloria's accident?

12 A As I remember it did, yes, sir.

13 Q Was there any similar memo to that effect prior to
14 Gloria's accident?

15 A Not to my recollection.

16 Q Were security officers from gate four going up to
17 the Frontier Cafe and picking up lunches real quick and
18 rushing back to the gate?

19 A On occasion.

20 Q Were you a security guard at that time, or were you
21 a lieutenant at that time?

22 A No, sir, I was a security guard.

23 Q Do you remember who the lieutenants were in July of
24 1988?

25 A No.

1 break can be in the back of the shack or somewhere else if we
2 so desire. We don't get any time to do it, but we have that
3 under the law.

4 Q Does Burns Security provide for that under their
5 manuals, or do you just have that under the law?

6 A It's under the law.

7 Q So Burns Security doesn't really provide for that,
8 do they, in their manuals?

9 A Sir, I don't know. I don't know that in detail.

10 Q Have you ever known anybody to be reprimanded for
11 eating lunch at the guard house there at gate four?

12 A No, sir.

13 Q Have you ever known anyone to be reprimanded for
14 going up to Frontier Cafe and picking up a sandwich and eating
15 it there at the guard shack?

16 A Not to my knowledge.

17 Q Do you know whether individuals were doing that in
18 1988?

19 A On occasion.

20 Q Do you know the names of any of the individuals
21 besides Gloria Swenson who were doing that?

22 A I guess I could say I was on occasion.

23 Q Did anyone ever tell you you were not supposed to do
24 that? I mean after, obviously the memo came out later, but
25 prior to Gloria's accident did anyone ever tell you you

1 A I would say four or 500 yards. I mean going by a
2 block I'd say a block at least, a city block.

3 Q Is the Frontier Cafe a city block away from gate
4 four?

5 A Yes, sir.

6 Q Is it more than a city block?

7 A No, sir.

8 Q So it's about the same as a city block?

9 A That's correct, sir.

10 Q It's about the same distance as going to lower gate
11 four?

12 A That's right.

13 Q Did you have occasion to work gate four regularly
14 during the summer months of 1988?

15 A Yes.

16 Q Did you know Gloria Swenson at that time?

17 A Yes.

18 Q Did you consider her to be a good employee?

19 A Yes.

20 Q Did you consider her to be a good guard?

21 A Yes.

22 Q Do you have occasion to work in that little building
23 next to gate four?

24 A I don't understand the question, sir.

25 Q Well, you said there was like a five by five little

1 Q What if you were an EMT, not just a security guard
2 but an EMT, would it be expected an EMT would assist in that
3 situation if someone were hurt?

4 A I don't know.

5 Q Is it possible that an EMT might consider it to be
6 their responsibility to assist?

7 MR. WILLIAMS: Object to the form of the question,
8 calls for speculation, and it's vague and ambiguous in use of
9 possible.

10 Q (By Mr. Patton) Is it possible that an EMT security
11 guard might consider that to be the responsibility?

12 MR. WILLIAMS: Same objection.

13 THE WITNESS: I don't know, sir.

14 Q (By Mr. Patton) Do you know if any of the
15 lieutenants or supervisors at Burns Security during the summer
16 of 1988 knew that you or Gloria or any other security officers
17 were going up to the Frontier Cafe and picking up a sandwich
18 and coming back and eating it?

19 A Yes, I would think so.

20 Q Why would you think that?

21 A Because occasionally they would come to the gate at
22 the time we were at the place picking up a lunch or whatever
23 we were picking up.

24 Q And that's because the lieutenants sort of roam
25 around the plant; isn't that true?